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**From:**

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**To:**

**Cc:**

**Subject:**

Regarding whether this is a prohibited transaction under section 4975(c)(1)(A) or section 4975(c)(1)(D) and (E), below is the analysis.

Section 4975(c)(1)(A) of the Code prohibits any direct or indirect sale or exchange or leasing, of any property between a plan and a disqualified person. Section 4975(c)(1)(D) of the Code prohibits any direct or indirect transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan. Section 4975(c)(1)(E) of the Code prohibits a fiduciary from dealing with the income or assets of a plan in his or her own interest or for his or her own account. Section 54.4975-6(a)(5) of the Pension Excise Tax Regulations characterizes transactions described in section 4975(c)(1)(E) as involving the use of authority by fiduciaries to cause plans to enter into transactions when those fiduciaries have interests which may affect the exercise of their best judgment as fiduciaries.

Based solely on the facts and representations contained in your case, the purchase of an interest in the Bank would not by itself constitute a transaction described in section 4975(c)(1)(A) of the Code (prohibiting any direct or indirect sale or exchange or leasing of any property between a plan and a disqualified person). Whether the transaction would violate sections 4975(c)(1)(D) and (E) of the Code raises questions of a factual nature. However, a violation of section 4975(c)(1)(D) and (E) would occur if the transaction was part of an agreement, arrangement or understanding in which the fiduciary caused plan assets to be used in a manner designed to benefit such fiduciary (or any person which such fiduciary had an interest which would affect the exercise of his best judgment as a fiduciary).

If an IRA fiduciary causes the IRA to enter into a transaction where, by the terms or nature of that transaction, a conflict of interest between the IRA and the fiduciary (or persons in which the fiduciary has an interest) exists or will arise in the future, that transaction would violate either 4975(c)(1)(D) or (E) of the Code. Moreover, the fiduciary must not rely upon and cannot be otherwise dependent upon the participation of the IRA in order for the fiduciary (or persons in which the fiduciary has an interest) to undertake or to continue his or her share of the investment. Furthermore, even if at its inception the transaction did not involve a violation, if a divergence of interests develops between the IRA and the fiduciary (or persons in which the fiduciary has an interest), the fiduciary must take steps to eliminate the conflict of interest in order to avoid engaging in a prohibited transaction. Nonetheless, a violation of section 4975(c)(1)(D) or (E) will not occur merely because the fiduciary derives some incidental benefit from a transaction involving IRA assets.

Thus, it becomes a question as to whether taxpayer's motivation to have his IRA purchase the stock from the ESOP was in the best interest of the IRA or to provide money for the ESOP to pay off the loan and for the taxpayer to gain a larger interest of stock in the Bank. It appears there is a conflict of interest in this case and that section 4975(c)(1)(D) and (E) would apply.

Take a look at the attached DOL Advisory Opinion 2000-10A (July 27, 2000) and I think this will be helpful in understanding the application of the prohibited transaction provisions in your case.